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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 690

THOMAS KENNETH WOLFE,
Petitioner,

vs.

CHARLES M. TASKA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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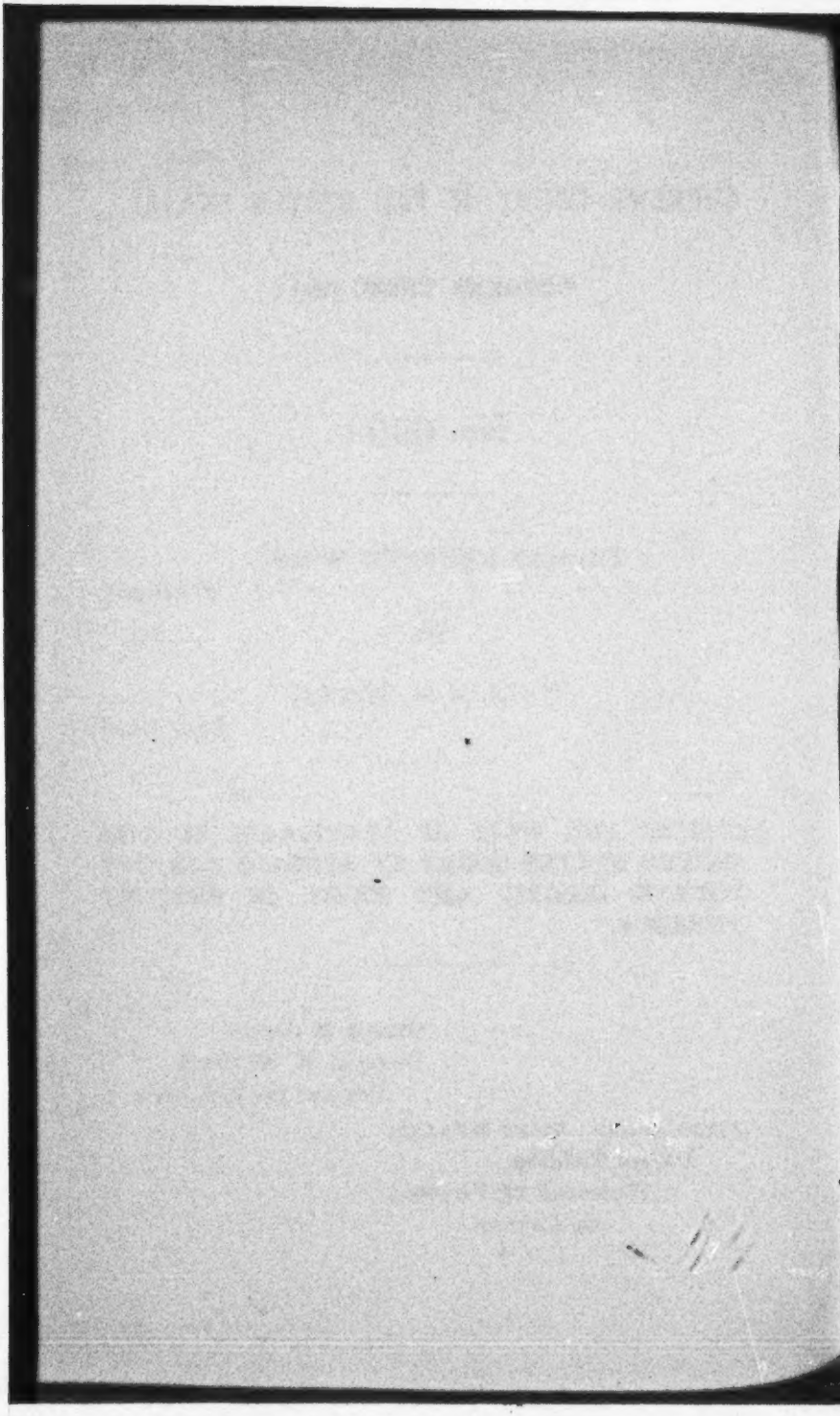

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The Petitioner, before going upon the hard surfaced portion of the road, looked to his right, the direction from which the Respondent came, about three city blocks, and saw no traffic approaching.

He then looked to his left and saw nothing coming from that direction and started across the highway on the horse in a normal walk. When he reached the center of the highway he looked to his right again and saw the defendant about one hundred yards away. He thought it safer to continue across than try to stop the horse and hold him in the center of the highway. He continued and was struck as the front feet of the horse reached the shoulder of the road. The Petitioner was therefore not guilty of any contributory negligence.. 18

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 690

THOMAS KENNETH WOLFE,

Petitioner,

vs.

CHARLES M. TASKA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable Chief Justice and The Associate Justices of the Supreme Court of The United States:

Thomas Kenneth Wolfe respectfully petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, filed and entered on February 2, 1954, denying a petition for re-hearing of the opinion of said Court in the case filed on the 21st day of December, 1953, reversing a judgment for the petitioner entered by the United States District Court for the Eastern District of Virginia at Richmond.

A

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, United States Code Annotated, Section 1254.

B

Summary Statement of the Matter Involved

Petitioner, on horseback, rode up to a straight, level, hard surfaced highway, 40 feet wide, with firm shoulders, 4 to 8 feet wide, looked for traffic in both directions, at least several hundred yards where visibility was good, and, seeing no traffic, started across on the horse in a normal walk, and as the horse's front feet stepped on the shoulder of the road on the other side, he was struck by the respondent's automobile, broadside, the horse killed and petitioner seriously and permanently injured.

Upon appropriate instructions, the jury returned a verdict for petitioner for $47,500.00, and judgment was entered thereon by the District Court. The Court of Appeals, by weighing the contradictory evidence, drawing inferences, judging the creditability of witnesses and drawing ultimate conclusions as to the facts, contrary to those drawn by the jury, reversed the judgment of the trial court and remanded the case with directions that the verdict be set aside and final judgment entered for the Respondent, which was accordingly done. A petition to re-hear was denied on February 2, 1954.

C

Question Presented

Since the jurisdiction of the District Court was invoked upon the ground of diversity of citizenship, the question presented is, whether the Court of Appeals has decided a point of Virginia law directly contrary to the statutory and

decisional law of Virginia on the subject, in violation of Title 28, Section 1652 of USCA and the Seventh Amendment to the Constitution of the United States.

D

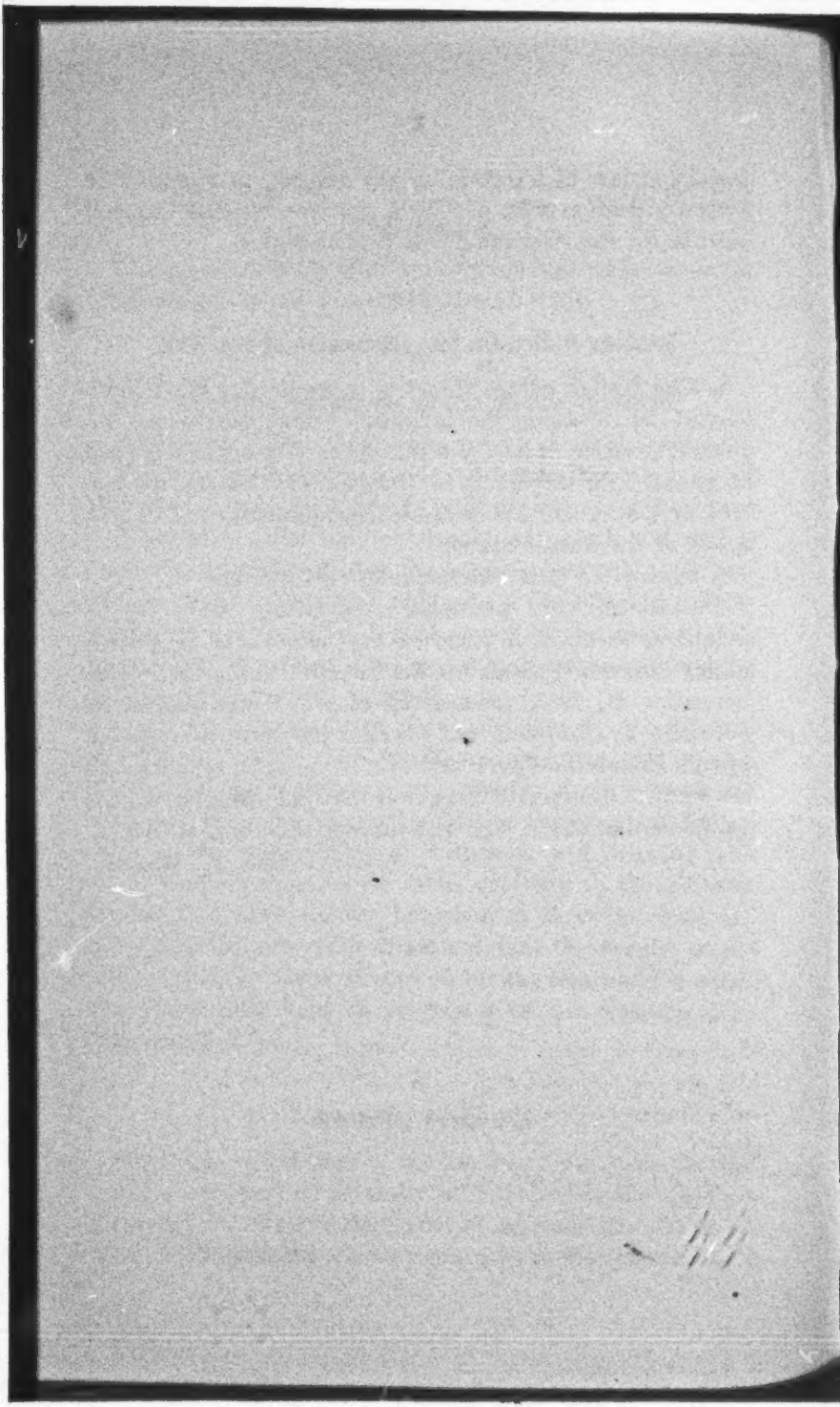
Reasons Relied On for Allowances of the Writ

1. The United States Court of Appeals for the Fourth Circuit, in reversing the judgment below, decided an important question of local law in conflict with applicable local decisions, and, therefore, in violation of Title 28, Section 1652 of USCA and the Seventh Amendment to the Constitution of the United States.

A supporting Brief accompanies this petition.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered on December 21, 1953, (re-hearing of which was denied on February 2, 1954) and that the said judgment be reversed by this Honorable Court, and that the case be remanded to the District Court with directions that judgment be entered on the verdict of the jury with interest according to law.

GEO. E. ALLEN.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 690

THOMAS KENNETH WOLFE,

Petitioner,

vs.

CHARLES M. TASKA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinions of the Court Below

The opinion of the United States Court of Appeals for the Fourth Circuit is reported in 208 Fed. 2d, at page 705, Transcript of Record, page 4.

The judgment of the District Court, with a memorandum of its reasons, for rendering judgment on the verdict of the jury appears on page 2 of the Appendix on behalf of Appellee and Cross-Appellee, Wolfe, Transcript of Record, 1A, page 2.

The judgment order recites:

> "* * * Court having taken time to consider thereof, doth now decide that the issues presented to the jury

embodied questions of fact to be determined by the jury and the jury having determined such issues of fact in favor of the plaintiff, the Court is of opinion that such determination is binding upon the Court and doth therefore overrule the motion of the defendant to set aside the verdict."

II

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, U. S. Code Annotated, Section 1254. The judgment of the United States Court of Appeals for the Fourth Circuit to be reviewed, was entered on the 21st day of December, 1953, Transcript of Record, page 10, and the re-hearing thereof was denied on February 2, 1954, Transcript of Record, page 12.

III

Statement of the Case

A summary statement of the case appears under heading "B" of the Petition for a Writ of Certiorari. In the interest of brevity, this statement is not here repeated, but is referred to with the request that it be considered as incorporated herein by reference.

IV

Question Presented

The question specifically brought forward by the Petitioner for a Writ of Certiorari is whether the Court of Appeals has decided a point of Virginia law directly contrary to the statutory and decisional law of Virginia on the subject, in violation of Title 28, Section 1652, of U. S. C. A. and the Seventh Amendment to the Constitution of the United States.

Statement of Facts

(Numerals in parenthesis refer to pages of Appendix to brief of Appellee and Cross-Appellee, Wolfe, in U. S. Court of Appeals, Transcript of Record 2A)

On or about the 24th day of June, 1951, in Chesterfield County, Virginia, while the Petitioner was traveling on horseback across United States Route No. 1, about the middle of the day (16), the defendant, Taska, driving a Lincoln automobile in a northerly direction, ran upon the Petitioner, injured him severely and killed the horse on which he was riding. The road at that point runs north and south, the hard surface portion of which is approximately forty feet wide (28, 34). The shoulders are firm and of varying width from four to eight feet (28). The Petitioner undertook to cross from the west to the east side. Looking to the south, from which the defendant came, the road is level and straight for at least 750 feet. To the north the road is straight at least 250 feet (28, 34). The day was clear (16). As the Petitioner rode up to the highway and turned to cross it he looked to his right about three city blocks and there was nothing in sight. He then looked to his left and there was nothing coming from the left (17). He then "pulled the reins around and pulled the horse up on the pike" (18); and proceeded straight across the highway with the horse in an ordinary walk (18). When the Petitioner got to the middle of the highway he looked to his right again. At that time the horse was astride the double white line in the center of the highway. It was then that he saw the Respondent's car coming from his right (18). The car was at that time about a hundred yards away (18). Petitioner tried to get across (18), but before he could get across he was struck by the automobile (19). When he was struck the front feet of the horse had gotten off of the road on the shoulder. The blow from the

automobile struck Petitioner on his right leg. "It hit so quick, I didn't know what had hit me." (19) Petitioner was seriously and permanently injured.

Frank Nester, a white man, forty-three years old, was riding another horse along with Mr. Wolfe at the time of the collision. He was a little behind Petitioner, about 15 or 20 feet (24). He saw the Petitioner ride onto the highway (24), and saw him look for traffic both to the right and to the left. He said that as Petitioner rode on the highway, he, Nester, was facing towards Petersburg, the direction from which Respondent came, and that he saw a car coming from that direction. When he saw the car, it was about 195 yards down the road (24). He fixed the distance by noticing that it was passing a Texaco filling station (24). He afterwards stepped the distance from the filling station to the point of the accident and found that it was 195 steps (25). He said the horse was walking across the highway at the average gait, under control. He did not actually see the automobile strike the horse, as he looked toward Richmond about that time (26), but the last time he saw the horse it had crossed over the middle lane of the highway (26).

Mr. Johnson, Virginia State Trooper, testified that when he arrived at the scene of the accident, he found the horse lying in the road on the east side of the highway on his left side (28). The head of the horse was in the direction of Petersburg and the feet were extended in toward the highway. It seemed to this witness that the horse was right on the edge of the hard surface (28). The horse was therefore on the extreme east side of the highway, that is, in the extreme right hand lane of Respondent.

The Respondent, Taska, said he did not see the horse when it entered the highway (35). When he first saw the man on the horse "he was about the middle of the highway" (36, 42, 43); "just walking across normally" (40);

"straight across" (42); "in the middle of the road" (42). He took his foot off of the accelerator and watched the horse (39). He judged his speed was 35 or 40 miles an hour (39). He was driving in a 50 mile zone (39). When he first saw the horse he was several hundred yards away (36); about two hundred yards away (42, 43); that his brakes were in good condition and that he could have stopped sooner than he did (43). He said "I could stop it mighty quick if I had to and I did stop in thirty-five or forty feet" (43). He didn't see Nester on the other horse (37). He said he was simply looking straight ahead where he was driving (37). He was handed Petitioner's exhibit numbered 15 and Petitioner's exhibit numbered 11, which show the Respondent's automobile and the place where the horse was lying in the road immediately after the accident (37). He admitted that the picture of the horse in the road showed accurately the position of the horse immediately after the accident (37).

Upon this evidence the jury returned a verdict in favor of the Petitioner for $47,500.00, upon which the District Court entered judgment, which judgment the Court of Appeals for the Fourth Circuit reversed, upon the ground that the evidence was not sufficient to support the charge that the Respondent was not guilty of negligence, but if he was negligent, Petitioner was guilty of contributory negligence, which barred recovery.

V

Summary of Argument

If there is anything certan in law, it is a certainty that the Supreme Court of Appeals of Virginia would have affirmed the Trial Court in rendering judgment upon the verdict of the jury in such a case as this. Since a Federal Court sitting in Virginia in a diversity case is considered merely as another State Court, it is compelled, under Title

28, Section 1652, United States Code Annotated, and the Seventh Amendment to the Constitution of the United States, to decide the case in accordance with the State law.

VI

ARGUMENT

Point I

The Negligence of the Respondent, Taska

Respondent, while driving an automobile in broad daylight on a straight, level, hard-surfaced highway, about 40 feet wide, with firm shoulders from four to eight feet wide, ran down the plaintiff, who was crossing the highway ahead of him on horseback. He did not see Petitioner when the horse entered upon the highway. He first saw the horse when he was in the middle of the road walking normally across. Petitioner was then about 200 yards (600') away. He merely "let up" on the accelerator and continued forward and struck the horse before he could clear the highway. He was therefore negligent.

The law of Virginia requires the driver of a car on a public highway to keep a proper lookout in order that he may avail himself of what the lookout discloses to prevent injury to himself as well as to others. *Yellow Cab Co.* v. *Gulley,* 194 S. E. 683, 169 Va. 611. The duty of maintaining a lookout not only involves the physical act of looking, but also a reasonably prudent reaction to whatever might be seen. *Penoso* v. *D. Pender Grocery,* 13 S. E. 2d 310, 177 Va. 245. The test in a case where the defendant is required by law to keep a proper lookout is not whether he actually saw the plaintiff in time to have saved him, but whether he could have seen him in time to have avoided the injury, by exercise of ordinary care, and failed to do so. *Yellow Cab Corp.* v. *Henderson,* 16 S. E. 2d 389, 178 Va. 207.

The Respondent was not keeping a proper lookout ahead or he would have seen the Petitioner on the horse and Nester on the other horse long before he did. When he saw the Petitioner on the horse proceeding slowly across the highway, he was about 200 yards away (600'). The Petitioner and the horse, he said, were about the middle of the highway. He took no precaution whatsoever to permit the Petitioner to complete his journey across the highway. He merely let up on the gas and continued forward. When he was about 25 or 30, or 35 or 40 feet away, he said, he applied his brakes, and turned his car to the left in an attempt to avoid the horse (40, 51). The car laid down skid marks 25 or 30 feet long (37). According to Officer Bates, the skid marks indicated a speed of 40 miles an hour (38, 39). But he did not take into consideration the fact that the contact with the horse helped to stop the car (38). Respondent testified, in response to questions by his own counsel:

"Q. Up until the time that you applied your brakes to cause the skid marks as shown in the picture, had there been any unusual movement of the horse?

"A. I didn't see any.

"Q. Well, why did you apply your brakes suddenly enough to place the marks on the road as shown in the pictures introduced by the plaintiff?

"A. Well, on account of the unusual action of the horse after he was off the highway. When he just got off the paved part of the highway, he went up in the air, and I don't know how many feet it was away, exactly, but when I saw the horse go up in the air I started turning and applied the brakes at the same time.

"Q. The officer testified your brake marks were 25 feet away. How would you say you were away from the horse when you saw him rear up?

"A. I wasn't any further than that; about 30 or 35 or 40 feet, I guess.

"Q. Did you put on brakes immediately——

"A. Immediately; as soon as I could. Maybe a split second elapsed.

"Q. The brake marks show that there was a turn to the left after they started in the lefthand lane. Why did you turn your car to the left?

"A. I tried to avoid hitting the horse." (40, 41).

So, it is at once apparent that Respondent either did not keep an effective lookout, or he was traveling so fast that when the Petitioner entered the highway, Respondent was not in sight. The jury could have based the verdict on either or both premises. When Respondent actually saw the Petitioner in the middle of the road, the horse "just walking across normally," he continued without materially checking his speed until he was within 25 or 30 feet of the horse when he applied his brakes and the horse reared up, evidently in an effort to get out of the way. We say this because Respondent, in answer to a direct question from his own counsel said that the horse had made no unusual movement until he applied the brakes. The pictures show that the skid marks extended at least to the point where the horse was lying in the road, possibly beyond (93, 95). So Respondent must have been dangerously close to the horse before he applied his brakes—so close that the application of the brakes frightened the horse and caused him to make an effort to get out of the way.

In *Tellis* v. *Traynham*, 195 Va. 447, 78 S. E. 2d 581, decided November 30, 1953, the plaintiff was driving a truck north, approaching a highway running east and west and the defendant was driving west on that highway.

The highway on which the defendant was traveling was a four lane concrete highway, 44 feet wide between curbs, bordered by sidewalks and with the usual double white line separating the two westbound lanes from the two eastbound lanes. As the plaintiff approached the intersection, he stopped his truck in obedience to a stop sign to let some cars pass which were approaching from his left. He then put his truck in low gear, looked again to his left, saw no other

cars were near from that direction; then looked to his right, and saw the defendant approaching at a distance of about 500 feet. The plaintiff thereupon proceeded across the intersection with his truck still in low gear, at about 5 to 10 miles an hour. When he reached the middle of the highway on which the defendant was traveling and was entering the first of the westbound lanes, he looked again to his right and saw the defendant's car approaching in that lane 150 to 200 feet away. Plaintiff continued across and when the front half of his truck had cleared the lane on which the defendant was traveling, he heard the brakes being applied on the defendant's car, looked back through the cab window of the truck and saw defendant's car swerving into him.

It will be observed that the defendant was approaching the intersection from the plaintiff's right hand and, as a general rule, under Virginia Code Section No. 46-238, had the right of way if the two vehicles either approached or entered the intersection at approximately the same time.

The questions involved in the case were the contributory negligence of the plaintiff and the negligence of the defendant in not availing himself of the last clear chance to avoid the accident. In discussing these questions, the Court, speaking through Mr. Justice Buchanan, said in part:

> "In his brief the defendant argues that it was negligence as a matter of law for the plaintiff to start across this four-lane highway from his stopped position after he had seen a car approaching 'in close proximity' to the intersection, on the presumption that it was traveling 25 miles an hour. As we have seen, the testimony is that the plaintiff saw the approaching automobile not in close proximity to the crossing, but about 500 feet away. * * *"
>
> "In fact, in his motion to strike plaintiff's evidence, the defendant did not claim that the plaintiff was negligent as a matter of law in starting out from the stop sign. On facts similar to those in this case we have fre-

quently held, and we now hold, that the question was for the jury. (Citing a long list of Virginia cases.)

"It is equally if not more clear that under the facts it cannot be said as a matter of law that the plaintiff was guilty of negligence in not stopping when his truck reached the center of the road. At that point plaintiff looked again to his right and saw the automobile 150 to 200 feet away, approaching in the lane the plaintiff was entering. The plaintiff testified that the defendant was then far enough away that he did not think he could be hit, and if he had stopped he would have been right in the defendant's path and bound to have been hit. He said 'I saw him coming. I saw no danger of any trouble at all. I had no idea that the terrific speed he was traveling. He was coming in a straight line at that time and I had plenty of time even then, I thought, to proceed on across. I kept on going and when I heard the brakes was the first indication he was going to hit me.' If the plaintiff had stopped and then been struck either by a car coming from his left or by the defendant's car from his right, there would have been more basis for imputing negligence to him than is to be found in the evidence before us now.

"The trial judge said that if there was contributory negligence on the part of the plaintiff he could not see it. The jury also could not see it. It is clear to us that the evidence does not disclose it as a matter of law."

The judgment of the trial Court on the verdict of the jury for the plaintiff was affirmed.

The real point in the *Tellis* v. *Traynham* case, however, is that the plaintiff moved into the highway from a stopped position after seeing the defendant about 500 feet away and then when the plaintiff reached the center of the four-lane highway, he looked again to his right and saw the defendant only about 150 to 200 feet away *approaching in the lane the plaintiff was entering*. In other words, while the plaintiff was crossing two lanes, the defendant ran 300 or 350 feet, leaving the defendant to run only 150 to 200 feet, while the plaintiff was crossing the other two lanes.

In the *Wolfe* v. *Taska* case, Taska said that when he first saw the horse in the middle of the road, walking normally straight across the road, he was then several hundred yards away (36); about 200 yards (42)(43). If we accept the smaller figure, then he was about 600 feet away. If we accept Petitioner's statement that when he looked to his right the second time when the horse was astride the double white lines, the Respondent was 100 yards (300 feet), then the Respondent was further away from Wolfe by 50 to 100 feet than the defendant in *Tellis* v. *Traynham* was from the plaintiff when the plaintiff looked to the right from the middle of the road. Yet, the Supreme Court of Appeals of Virginia held that the plaintiff in *Tellis* v. *Traynham* was not guilty of contributory negligence as a matter of law and that the defendant was not free from negligence as a matter of law, and the U. S. Court of Appeals for the Fourth Circuit held in *Wolfe* v. *Taska* that Wolfe was guilty of contributory negligence and that Taska was not guilty of any negligence.

Dodd v. *Coakley*, 195 Va. 554, 79 S. E. 2d 648, decided January 25, 1954, cites the Tellis case with approval. In that case, Thomas, driver of a truck, approached a right angle intersection from the South, stopped in obedience to a stop sign, then started slowly across an arterial highway and was struck before he could get across by a car coming from his right. One entering the intersection from the stop sign, as Thomas did, normally could see two blocks to his right. Thomas was killed, but a witness testified that she looked about a block in the direction from which the defendant came at the same time she saw Thomas look and saw no car approaching. In affirming a judgment on a jury verdict, the Court said:

> "Had the defendant been looking, necessarily he would have seen an object as big as this truck, proceeding across the intersection in front of him from its stopped position at the stop sign. As the jury

could reasonably have decided, the defendant drove blindly into the intersection, into the truck that was right in front of him, at a speed sufficient to skid the wheels of his car ten to sixteen feet, and then strike the extreme right rear end of the truck with enough force to knock it around and turn it over.

"It was made certain by the evidence that the truck stopped just before it entered the intersection. It is not certain where the defendant's car was when the truck started out from the stop sign and proceeded into the intersection. Plaintiffs' witness, who was in her yard, looked east, as Thomas looked, down Oronoco as the truck started across, and she saw no car coming. Where the car was at that time is not shown. *But if he did see it and it was, as it could have been, at such a distance away that he reasonably thought it was safe for him to proceed, he was not guilty of negligence as a matter of law.* If reasonable men could differ on that point under this evidence, and we think they could, then the question was for the jury.

"(2) Contributory negligence is not presumed. The burden of that defense is on the defendant, and it must be established either by the defendant's evidence or the plaintiff's evidence. We cannot say as a matter of law that it was here established by either. In order so to conclude, it would have to be presumed, contrary to a reasonable inference from the evidence, that when Thomas looked he did so carelessly and that he started across when Dodd's car was so near that a reasonable person would have known that it was not safe to cross.

"*Temple* v. *Ellington*, 177 Va. 134, 12 S. E. (2d) 826, involved a situation similar to the one here. There, in the morning of a clear day, Temple drove his truck north from a private road, where it was his duty to stop (Code § 46-240), into a main east-west highway. He had a clear view for some 500 feet to the west. After proceeding through the intersection until his truck was within about four feet of the north edge of the hard surface of the main highway, he was struck by a car driven by Moses approaching from the west.

We said that the statute requiring him to stop must be given a reasonable construction and that when a driver on a private road approaches an intersection, stops and looks in both directions, he is not guilty of negligence as a matter of law it he enters the intersection under a reasonable belief that it is safe to cross. In holding that the question of Temple's negligence was for the jury, we said 'the jury might have believed that Mr. Temple saw the Moses car and acting as a prudent person thought the car far enough away to permit him safely to enter the highway ahead of the Moses car.'

"In *Leo Butler Co.* v. *Wolbun,* 192 Va. 263, 64 S. E. (2d) 738, we said that what is a proper lookout in a given situation is a question which can only be answered by the facts of the particular case; that the duty is to look with reasonable care; that generally negligence is for the jury and should not be taken from it unless there is no real conflict. That case also involved a collision at an intersection in Alexandria, and we held on the facts shown there that it was for the jury to decide whether the plaintiff was guilty of contributory negligence.

"In situations similar to the one here, contributory negligence was held to be a jury question in these cases, among others: *Angell* v. *McDaniel,* 165 Va. 1, 181 S. E. 370; *Greenleaf* v. *Richards,* 178 Va. 40, 16 S. E. (2d) 374; *Brown* v. *Wallace,* 184 Va. 570, 35 S. E. 793; Caldwell v. Parker, 191 Va. 471, 62 S. E. (2d) 34; *Clayton* v. *Taylor, supra,* 193 Va. 555, 69 S. E. (2d) 424; *Hebner* v. *Sullivan,* 194 Va. 259, 72 S. E. (2d) 689; *Tellis* v. *Traynham,* 195 Va. 447, 78 S. E. (2d) 581."

In addition to the case law on the subject there are two Virginia statutes which controlled Taska after he saw Wolfe in the middle of the highway. These are Sections 46-208 and 46-209. Section 46-208 provides:

"Irrespective of the maximum speeds herein provided, any person who drives a vehicle upon a highway recklessly or at a speed or in a manner so as to en-

danger life, limb or property of any person shall be guilty of reckless driving * * *."

Section 46-209 provides:

"A person shall be guilty of reckless driving who shall:

"(1) Drive a vehicle when not under proper control * * *."

"(7) Exceed a reasonable speed under the circumstances and traffic conditions existing at the time; * * *."

Point II

The Contributory Negligence of Petitioner, Wolfe

The Petitioner, before going upon the hard surfaced portion of the road, looked to his right, the direction from which the Respondent came, about three city blocks, and saw no traffic approaching. He then looked to his left and saw nothing coming from that direction and started across the highway on the horse in a normal walk. When he reached the center of the highway he looked to his right again and saw the defendant about one hundred yards away. He thought it safer to continue across than try to stop the horse and hold him in the center of the highway. He continued and was struck as the front feet of the horse reached the shoulder of the road. The Petitioner was therefore not guilty of any contributory negligence.

It will be recalled that Wolfe entered the highway from the west side after first looking both ways, while on the shoulder of the road. He looked first to his right, which was the normal thing to do and then to his left. No traffic was in sight. The horse then stepped up on the highway and walked straight across in a normal manner. When Wolfe reached the center of the highway, with his horse's front feet just over the double white line, he looked again

and saw the defendant's automobile about 100 yards away. Wolfe continued across thinking that was safer than to stop the horse in the middle of the highway. He was asked by counsel for defendant upon cross examination:

> "When you saw that he was coming 'pretty peart, or now you say fast, why didn't you stop your horse in the middle of the road and let him come on by you?"

and he answered:

> "You wouldn't want to stop a horse in the middle of the highway like that." (22)

On re-direct examination, he was asked:

> "Mr. Wolfe, Mr. Taylor asked you about stopping the horse in the middle of the road. Why didn't you stop the horse in the middle of the road?"

and he answered:

> "Because I didn't want to stop in the middle of the road and take a chance on both of us getting killed." (22)

We refer again to the *Temple* case, 12 S. E. (2d) 826. In that case the plaintiff was a passenger in the car on the highway and the issue was whether the driver of the car in which the passenger was riding was guilty of negligence which was the sole proximate cause of the accident. Temple entered an arterial highway from a side road; the trial resulted in a verdict for Temple. The trial Court set the verdict aside on the theory that the evidence disclosed as a matter of law that Temple drove the car from a private road onto a public highway when the car driven by Moses was approaching dangerously near and that Temple's conduct, as a matter of law, constituted negligence concurring with that of Moses, which was the proximate cause of the injuries to

the passenger in the Moses car. A new trial was awarded only on the question of damages. On the new trial, the jury awarded a verdict for the plaintiff.

On appeal, the Court reversed and held that the question of Temple's negligence in entering the highway was for the jury. The case was remanded with directions that judgment be entered on the verdict for the defendant. The Court said in part:

> "Code, § 2154 (124), provides that the driver of a vehicle entering a public highway from a private road shall, immediately before entering the public highway, stop, and upon entering the highway he shall yield the right of way to all vehicles approaching on such public highway.
>
> "The plaintiff contends that Mr. Temple violated that section of the Code. She also contends that he entered the public highway when the Moses car was approaching dangerously near.
>
> "The statute must be given a reasonable construction. It does not grant an exclusive privilege to drivers on the public highway regardless of their duty to obey traffic laws and to exercise reasonable care to protect the rights of others. When a driver on a private road approaches an intersection, stops, and looks in both directions for approaching traffic on the public highway, acting as a reasonably prudent person exercising due care would act, he is not negligent as a matter of law if he attempts to enter the intersection under the belief that he has time and opportunity to cross safely. He is only required to yield the right of way to those lawfully approaching so near the intersection that he cannot safely enter it. The driver of any vehicle traveling at an unlawful speed forfeits 'any right of way which he might otherwise have hereunder.'"

Of course, there is no statute which required Wolfe to stop. The Judge's charge clearly defines Wolfe's duty and clearly told the jury that if Wolfe and Taska were both guilty of negligence, Wolfe could not recover.

We quote:

"Mr. Wolfe had a duty imposed upon him. It was his duty in riding his horse across the highway to keep a proper lookout and to use reasonable care for his own protection, as well as for the protection of others, in using the highway, and in entering the highway from a private lane or from private premises it was his duty to yield the right of way to vehicles legally traveling on the highway; that is, before entering the highway, Mr. Wolfe was charged with the duty of seeing that he could cross with reasonable safety. It practically boils down to that.

"Now, if you believe that Mr. Taska failed in performing the duties imposed upon him by law, or any of the duties imposed upon him, and that such failure was the sole proximate cause of the collision, you will find for Mr. Wolfe. If you believe that Mr. Wolfe failed in the performance of his duty and that that failure was the sole proximate cause or a contributing cause of his injuries, then your verdict should be for the defendant, Mr. Taska. If you believe that the accident was caused by the joint and concurring negligence of both Taska and Wolfe, then your verdict should be for the defendant, the plaintiff not having borne the burden in this instance imposed upon him to entitle him to a verdict." (6, 7)

In the late case of *Caldwell* v. *Parker*, 191 Va. 471, 62 S. E. (2d) 34, decided November 27, 1950, the Court reviews the cases on the subject.

We quote:

"Plaintiff was obligated to exercise ordinary care to look for and heed traffic approaching along the highway that might be seen and reasonably expected to affect his intended movement. However, because he did not see this car and avoid the collision, it cannot be said as a matter of law that he failed to perform his duty in this respect. It was not incumbent upon him to insure his safe passage into and along the highway from the dangers of a speeding car that may well have been be-

yond the range of reasonable vision when he slowly entered the highway and yet due to its excessive speed have struck him as this car did before he reached the far side of the road. Strikingly pertinent to these facts is the language of Mr. Justice Gregory in *Angell* v. *McDaniel*, 165 Va. 1, 6, 181 S. E. 370, 372:

"'* * * Another fact ignored is that the plaintiff only was required to look down Campbell Avenue for a reasonable distance for approaching traffic. He certainly was not required to anticipate and foresee that the defendant's car would be driven into the intersection at sixty to seventy miles an hour without diminishing its speed. He stated that he looked and could see very plainly down Campbell Avenue almost to the next cross street. If he reasonably looked for a reasonable distance considering all of the surrounding circumstances he was not guilty of contributory negligence as a matter of law in driving into the intersection. At most it was a jury question. * * *'

"Approval of the holding in the case on *Angell* v. *McDaniel, supra*, is found in the language of Mr. Justice Spratley in *Yellow Cab Co.* v. *Gulley*, 169 Va. 611, at page 619, 194 S. E. 683, at page 686, wherein it is said:

"'In the Angell case, supra, the plaintiff testified that while traveling at a reasonable speed he entered an intersection of a city street, and seeing no car approaching, had almost crossed the intersection before he was struck by the defendant's car, traveling at a speed of sixty to seventy miles an hour. The evidence of the plaintiff, and certain evidence of other conditions, presented questions of fact for the jury to determine whether or not the plaintiff could or ought to have seen the defendant's car if he did look as he claimed.'"

"Plaintiff's failure to see the oncoming car until about the moment of the impact has been reasonably and sufficiently explained. We are constrained to conclude that the evidence as a whole presented a question of fact as to whether or not plaintiff was guilty of contributory negligence. That issue having been determined by the jury, we are not permitted to disturb it."

is respectfully submitted that the question whether tioner was guilty of contributory negligence was prop- submitted to the jury under the Virginia law, and that verdict of the jury is final and conclusive on the subject.

Point III

The Last Clear Chance Doctrine in Virginia

r. William T. Muse, teacher of the Law of Torts in the . Williams School of Law, has made an excellent con- ution to the law on this subject in his Virginia Annota- s to Sections 479 and 480 of the Restatement of the of Torts in the field of negligence. He reviews and yzes all the Virginia cases on the doctrine of last clear nce. It readily appears from this review and analysis Virginia, contrary to the weight of authority elsewhere, adopted the humanitarian doctrine. Under this doctrine plaintiff may recover, notwithstanding his continuing ure to exercise ordinary care for his own protection if defendant "would have discovered the plaintiff's negli- conduct and thus had reason to realize the plaintiff's less peril had he exercised the care which it was his duty he plaintiff to exercise." The general rule elsewhere uch a case is that a plaintiff who, by the exercise of onable vigilance could have observed the danger cre- l by the defendant's negligence, in time to have avoided ry therefrom, may recover if, but only *if*, the defendant *w* of the plaintiff's situation *and* realized or had reason ealize that the plaintiff was inattentive and therefore kely to discover his peril in time to avoid the injury thereafter is negligent in failing to use, with reason- care, his then existing ability to avoid the injury. But, court, in following the humanitarian doctrine, has inter- ted into the second case the rule applied in the first, ely, that the plaintiff, notwithstanding his continuing ligence, may recover if the defendant "*would* have dis-

covered the plaintiff's situation and thus had reason to realize the plaintiff's helpless condition had he exercised the care which it was his duty to the plaintiff to exercise."

In this case the defendant, Taska, actually saw Wolfe on a horse in the middle of a four-lane highway. The horse was at that time moving in a normal walk directly toward the lane in which Taska was driving. This lane was only a few feet from the place where the horse was when Taska saw him. Taska was, *at that time*, according to his own testimony, about 200 yards away; according to plaintiff's testimony when *he* saw the defendant, the defendant was 100 yards away. Taska said his brakes were in good condition and that he could have stopped sooner than he did (43). Referring to his automobile, he said "I could stop it mighty quick if I had to and I did stop in 35 or 40 feet" (43). He said he was looking straight ahead where he was driving (37). It is *unthinkable* that a motorist should see a man on a horse walking normally across the highway in front of him at a distance of 200 yards, *looking straight at him*, and proceed without sufficiently checking his speed or changing his course to avoid striking the horse before he entirely clears the highway.

In *Clay* v. *Bishop*, 182 Va. 747, the Court said:

> "Manifestly, the last clear chance instruction was designed to meet this situation and to submit to the jury whether, notwithstanding the negligence of Bishop in leading the horse on the wrong side of the highway, as found by the Court, and exposing himself to danger, this situation was obvious to the driver (who admits that it was), and whether the driver, by the exercise of ordinary care, could have avoided injuring him. Clearly the lower Court was right in submitting this issue to the jury."

In *Herbert* v. *Stephenson*, 184 Va. 457, 35 S. E. (2d) 753, the Court said:

"Conceding the continuing negligence of the plaintiff in walking on the wrong side of the roadway, still he can recover, if the defendant had the last clear chance to avert the injury and failed to avail himself of it."

In *Barnes* v. *Ashworth*, 154 Va. 218, 242, 153 S. E. 711, this was said:

"However, in Virginia, and in some other States, the doctrine of the last clear chance has been extended much further and the rule is applied (1) to that class of cases in which the peril of the plaintiff was actually known to the defendant or ought to have been known to him from facts and circumstances brought home to his knowledge, and (2) to that class of cases in which the defendant owes to the plaintiff a duty to keep a reasonably careful lookout, commensurate with the nature of the agency he is using or operating and the nature of the locality, and by the exercise of ordinary care ought to have seen or known of the plaintiff's perilous situation in time to have avoided the injury by the exercise of ordinary care.

In *Dobson-Peacock* v. *Curtis*, 166 Va. 550, 186 S. E. 13, it was said:

" * * * We should bear in mind that a defendant is liable under the last clear chance doctrine both where he actually sees the peril of the plaintiff and fails to exercise ordinary care to avert the injury, and also where the defendant being under a duty to keep a proper lookout for the plaintiff, by the exercise of ordinary care, should have seen the plaintiff's peril in time to have avoided the injury by the use of ordinary care."

In the case of *Bennett* v. *Spencer*, 167 Va. 268, 189 S. E. 169, it was said:

"It may be conceded that the deceased was in a continuous state of contributory negligence, but he was visible for a considerable distance and had Miss Spen-

cer been looking, as was her bounden legal duty, she should have avoided the accident. It is plain to see that this is a case for the application of the last clear chance doctrine."

In *Crawford* v. *Hite*, 176 Va. 69, the Court said:

"Even if it be conceded that she was guilty of negligence in walking on the pavement, this does not necessarily preclude a recovery because there was ample evidence to support the finding of the jury that the driver of the truck, by the exercise of ordinary care, could or should have seen Mrs. Cook in a position of danger and could have avoided running into her. In such a situation the jury had the right to find that the negligence of the deceased was the remote cause and that of the driver was the sole proximate cause of the collision."

In *Slate* v. *Saul's Administrator*, 185 Va. 700, 40 S. E. (2d) decided November 25, 1946, the Court said:

"If the driver of the bus saw the deceased and had an opportunity to save him and failed to do so, this would have been sufficient to carry the question of the last clear chance to the jury. The same would apply even if the driver of the bus did not see the auto of the plaintiff's decedent. It was his duty to keep a lookout, and if he had done so, he would have been bound to have seen the auto proceeding into the intersection. * * * There was enough evidence on the doctrine of the last clear chance to warrant the Court in submitting it to the jury."

On *Stuart* v. *Coats*, 186 Va. 227, 42 S. E. (2d) 311, the Court said:

"* * * the continuing negligence of the plaintiff does not bar his right to recover if the defendant has a last clear chance to keep from injuring him: 'On Virginia we have been more liberal than in other jurisdictions in applying the doctrine. We have held, against the majority of other jurisdictions, that even though the

negligence of the plaintiff continues to the moment of injury, this would not relieve the defendant of liability if he knew or ought to have known the peril in which the plaintiff had negligently placed himself and had a clear chance, notwithstanding such negligence, to save him from injury. *Barnes* v. *Ashworth*, 154 Va. 218, 153 S. E. 711.' "

Under the Virginia Law, if Petitioner was negligent, the last clear chance doctrine was clearly applicable to the case and the verdict might well have been based on that doctrine.

Point IV

State Laws as Rules of Decision and the Seventh Amendment

Title 28, Section 1652, United States Code Annotated, declares:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the Courts of the United States, in cases where they apply."

While every Federal Judge and every lawyer worthy of the name who practices in the Federal Courts is thoroughly familiar with the famous case of *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, nevertheless it is refreshing to refer to it now and again lest we lose sight of its full import. In that case Mr. Justice Brandeis, speaking for the Court, said:

> "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by the highest Court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state

whether they be local in their nature or 'general', be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal Courts." * * *

" * * * Law in the sense in which Courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else. * * *".

Erie v. *Tompkins*, of course, has been followed by the Federal Courts ever since the opinion in the case was announced.

The Seventh Amendment to the Constitution merely provides that:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Reading this Constitutional provision in connection with Title 28, Section 1652 and *Erie* v. *Tompkins*, construing the section, it is perfectly clear that the trial by jury provided for is a trial according to the applicable substantive law and that in diversity cases, since a United States Court is sitting merely as another State Court (*Guaranty Trust Co. of New York* v. *York*, 326 U. S. 99, 65 S. Ct. 1464), the applicable substantive law is *the law of the State*. Since the sufficiency of the evidence goes to the *very right of recovery*, the question of its sufficiency must necessarily constitute substantive law, and no Court can set aside a verdict if there is evidence of the violation of substantive law to support it, without violating the Seventh Amendment

to the Constitution. The case was clearly one in which jury trial was required by express provision of the Seventh Amendment to the Constitution."

The seductive argument is often referred to that a conclusion of fact which appears to the Court to be reasonable is so clear that reasonable men could reach no other and therefore the question is one for the Court. If this sort of reasoning is allowed to prevail, however, it means that the Courts are substituting their judgment for that of the jury on fact questions in violation of the Constitutional requirement.

If we were in Court under a federal law like the Federal Employers Liability Act, the sufficiency of "the evidence to support a verdict" would be a "question of substantive law as interpreted by the Federal Courts." *Showalter* v. *Western Pac. R. Co.*, 106 P. (2d) 895, citing *Chicago etc. R. R. Co.* v. *Coogan*, 271 U. S. 472, 46 S. Ct. 564, 70 L. Ed. 1041 and in *Willis* v. *Penn. R. R. Co.*, 122 F. (2d) 248, c. d. 314 U. S. 684, it was held:

> "In an action under Federal Employers' Liability Act, whether evidence of negligence is sufficient for a jury is determined by Federal, rather than State, decisions."

To the identical effect are *Lloyd* v. *Alton R. Co.*, 159 S. W. (2d) 267; *Bimberg* v. *Northern Pacific R. R. Co.*, 14 N. W. (2d) 410, and *Kansas City Southern Railroad Company* v. *Larsen*, 114 S. W. (2d) 1081.

On the other hand, where no federal law is involved and the jurisdiction of the Federal Court is based upon diversity of citizenship, the sufficiency of the evidence to support a verdict must be determined by the State decisions. Title 28, Section 1652, U. S. C. A.; *Erie* v. *Tompkins*, *supra*.

In *Meredith* v. *City of Winter Haven*, 320 U. S. 228, 64 S. Ct. 7, it was held:

"Latest decision of State Supreme Court, on question of law involved in action in federal court, must be taken as controlling, unless it can be said with some assurance that the State Supreme Court will not follow that decision in the future."

In the course of the opinion (by Chief Justice Stone), the Court said that *Erie* v. *Tompkins*, placed upon Federal Courts "a greater responsibility for determining and applying State laws in all cases within their jurisdiction in which Federal law does not govern."

Mr. Justice Frankfurter in *Guaranty Trust Co. of New York* v. *York, supra*, undertook to settle this question clearly and distinctly for all time. One of the questions of State law involved in that case was the statute of limitations and the discussions revolved around whether the statute was procedural or substantive. Speaking for the Court, Mr. Justice Frankfurter said:

"Matters of 'substance' and matters of 'procedure' are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course, 'substance' and 'procedure' are the same key-words to very different problems. Neither 'substance' nor 'procedure' represents the same invariants. Each implies different variables depending upon the particular problem for which it is used. * * *

"Here we are dealing with a right to recover derived not from the United States but from one of the States. When, because the plaintiff happens to be a non-resident, such a right is enforceable in a federal as well as in a State Court, the forms and mode of enforcing the right may at times, naturally enough, vary because the two judicial systems are not identic. But since a federal court adjudicating a state-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover

is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State.

"And so the question is not whether a statute of limitations is deemed a matter of 'procedure' in some sense. The question is whether such a statute concerns merely the manner and the means by which a right to recover, as recognized by the State, is enforced, or whether such statutory limitation is a matter of substance in the aspect that alone is relevant to our problem, namely, does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court?

"It is therefore immaterial whether statutes of limitation are characterized either as 'substantive' or 'procedural' in State court opinions in any use of those terms unrelated to the specific issue before us. *Erie R. Co.* v. *Tompkins* was not an endeavor to formulate scientific legal terminology. It expressed a policy that touches vitally the proper distribution of judicial power between State and federal Courts. In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. The nub of the policy that underlies *Erie R. Co.* v. *Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away, should not lead to a substantially different result. And so, putting to one side abstractions regarding 'substance' and 'procedure', we have held that in diversity cases the federal courts must follow the law of the State as to burden of proof, * * *.

"*Erie R. Co.* v. *Tompkins* has been applied with an eye alert to essentials in avoiding disregard of State law in diversity cases in the federal courts. A policy so important to our federalism must be kept free from

entanglements with analytical or terminological niceties. * * *

"Diversity jurisdiction is founded on assurance to non-resident litigants of course free from susceptibility to potential local bias. The Framers of the Constitution, according to Marshall, entertained 'apprehensions' lest distant suitors be subjected to local bias in State courts, or, at least, viewed with 'indulgence the possible fears and apprehensions' of such suits. *Bank of the United States* v. *Deveaux*, 5 Cranch 61, 87, 3 L. Ed. 38. And so Congress afforded out-of-State litigants another tribunal, not another body of law. The operation of a double system of conflicting laws in the same State is plainly hostile to the reign of law. Certainly, the fortuitous circumstance of residence out of a State of one of the parties to a litigation ought not to give rise to a discrimination against others equally concerned but locally resident. The source of substantive rights enforced by a federal court under diversity jurisdiction, it cannot be said too often, is the law of the States. Whenever that law is authoritatively declared by a State, whether its voice be the legislature or its highest court, such law ought to govern in litigation founded on that law, whether the forum of application is a State or a federal court and whether the remedies be sought at law or may be had in equity.

In the famous case of *Slocum* v. *New York Life Insurance Company*, 228 U. S. 364, 33 S. Ct. 523, Mr. Justice Van Devanter, speaking eloquently at length said in part:

"The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy . . . One of the strongest objections originally taken against the Constitution of the United States was the want of an express provision securing the right of trial by jury in civil cases. As soon as the Constitution was adopted, this right was secured by the 7th Amendment of the Constitution proposed by Congress; and which received

an assent of the people so general as to establish its importance as a fundamental guaranty of the rights and liberties of the people."

This principle is embodied in the following Virginia Code Section, No. 8-491:

> "When a case at law, civil or criminal, is tried by a jury and a party excepts to the judgment or action of the court in granting or refusing to grant a new trial on a motion to set aside the verdict of a jury on the ground that it is contrary to the evidence, or when a case at law is decided by a court or judge without the intervention of a jury and a party excepts to the decision on the ground that it is contrary to the evidence and the evidence (not the facts) is certified, the judgment of the trial court shall not be set aside unless it appears from the evidence that such judgment is plainly wrong or without evidence to support it."

Judge Prentis, in *Smith-Gordon Company, Inc.* v. *Snellings*, 130 Va. 528, 107 S. E. 651, in passing upon the effect of this statute, said:

> "The argument of the attorney for the plaintiff in error in this court, while forceful and worthy of most careful consideration, if addressed to the jury or to the trial court, cannot be effective here because based upon certain conflicts in the testimony and upon inferences adverse to the defendant, * * *. All such questions arising out of conflicts in the testimony, or out of inferences to be properly drawn therefrom, are settled by the judgment of the trial court, and here we are constrained and controlled by the statute (Code 1919, § 6363), which provides that when a case is thus submitted the judgment of the trial court shall not be set aside unless it appears from the evidence that it is plainly wrong, or without evidence to support it."

It has been the purpose of the Supreme Court of Appeals of Virginia to vitalize this section of the code in its appli-

cation and administration. "The initial step of the trial court, that of setting aside the verdict," says Judge Burks, "can only be taken either where there is no evidence at all to support the verdict, or else the verdict is *plainly* contrary to the evidence * * *." Burks Pleading and Practice, Third Edition, page 298.

In *Braxton* v. *Flippo*, 33 S. E. (2d) 757, 183 Va. 839, Mr. Justice Holt, discussing the question of the power of the Trial Court to set aside the verdict said:

> "He must be satisfied from the evidence adduced, either that there was no evidence to support the verdict, or that the verdict was plainly contrary to the evidence. * * *"
>
> "In borderline cases the verdict of a jury should prevail and should not be set aside merely because the judge, had he been a member of the jury, would have favored another verdict."

In this day and time, when many Courts are setting aside verdicts of juries, if this great Court, of last resort, on the subject, does not now and again grant Certiorari to check encroachment upon this fundamental right of the benefit of a trial by jury, inferior Courts by the gradual process of judicial erosion, will slowly wear away a major portion of the essential guarantee of the Seventh Amendment. This Court alone can harmonize the idea among the Courts of preserving the historic common law governing the relations of Judge and jury, with the notion of a delevoping common law.

Conclusion

For the foregoing reasons, this petition for Certiorari should be granted.

Respectfully submitted:

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